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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 962

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

versus

THE DAY COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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THE DAY COMPANIES, INC.,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 26, 1968.

OPINIONS BELOW.

The opinions of the District Court, in reality an order dismissing respondent's complaint (R. 23-33) and an order adhering to such dismissal after the complaint was amended (R. 52), have not been reported. Copies are appended as Appendix I.

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix II.

JURISDICTION.

The judgment of the Court of Appeals (R. 62) was entered November 26, 1968. A Petition for Re-hearing (R. 73) was denied December 23, 1968.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was initally invoked by respondent at the time of filing the original complaint on the ground of diversity of citizenship and amount involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTIONS PRESENTED.

I. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals contrary to the Rules of Decision Act, Title 28, Section 1652, United States Code, decided an important State question in a way in conflict with applicable Georgia law.

II. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals failed to apply the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort.

III. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals has overturned a decision of the District Court which had achieved a clearly permissible result in the application of Georgia law contrary to well established principles of Federal jurisdiction as evidenced by decisions of this Court, its own decisions in other cases, and decisions of other Circuit Courts of Appeals in similar situations.

STATUTES INVOLVED.

The only United States statute involved is **Title 28, Section 1652, United States Code**, which provides:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as Rules of Decision of Civil actions in the courts of the United States, in cases where they apply."

The applicable Georgia Statute is **Georgia Code Section** 20-504 which provides:

> "**Contracts against public policy; illustrations.**—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty."

STATEMENT OF THE CASE.

The Day Companies, Inc., a Mississippi corporation, alleging itself to be successor by merger to Columbus Packing Company, Inc., invoking jurisdiction upon the basis of diversity of citizenship and amount involved, instituted an action for injunctive relief and damages in the Rome Division of the United States District Court for the Northern District of Georgia against Patat Plywood Corporation, a Georgia corporation, and Claud T. Patat, Jr. and John L. Farris, Georgia residents.

The complaint alleged that Farris Plywood Company, a Georgia corporation of which John L. Farris was president and principal stockholder, located at Cuthbert, Georgia, engaged in the manufacture of plywood, and having earned surplus and undistributed profits in excess

of $400,000.00, was acquired by Columbus Packing Company, Inc. on April 20, 1966, through the purchase of all of its outstanding capital stock for an aggregate sum of $465,000.00, from John L. Farris, Mrs. Nora Lee Farris, Mrs. Lois Farriss McLendon and Carolyn Farris. Claud T. Patat, Jr. was the manager of said corporation.

The contract of sale provided in part that John L. Farris would remain in the employ of the company in an advisory and consulting capacity until December 31, 1966 at a salary of $500.00 per month and contained the further proviso that

> ". . . the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

The contract further provided that the salary of Claud T. Patat, Jr. of $1,000.00 per month would be continued for the remainder of 1966, and that he be paid a bonus of $10,000.00 December 31, 1966, which obligations were complied with by Columbus Packing Company, Inc. All common stock in Farris Plywood Company was transferred to Columbus Packing Company, Inc. which became sole stockholder and owner of Farris Plywood.

It was further alleged that Claud T. Patat, Jr., together with Francis E. Patat and Claud T. Patat, Sr., incorporated Patat Plywood Corporation in Polk County, Georgia, March 15, 1967, which company began business March 22, 1967 with Claud T. Patat, Jr. as President and John L. Farris as Vice President and Treasurer, and that Patat

Plywood Corporation was engaging in the manufacture and production of plywood which it is selling in the same area in which Farris Plywood was operating on April 20, 1966, and in which the Day Companies, Inc. is still operating.

The complaint further alleged that defendants Patat and Patat Plywood Company had knowledge of the terms of the contract signed by John L. Farris, and with full knowledge thereof are aiding and abetting John L. Farris to violate his contract in that he is connected with and concerned in a business and employment in direct competition with the plaintiff in the area operated in by Farris Plywood Company at the time the contract was executed, thereby causing the plaintiff irreparable damage, and that plaintiff had been damaged in the sum of $100,000.00 by the combined acts of the defendants. Injunctive relief and damages in the sum of $100,000.00 were sought.

Defendants filed a Motion to Dismiss pursuant to Rule 12 (b), Federal Rules of Civil Procedure on grounds averring that the covenant not to compete was contrary to public policy of the State of Georgia and therefore null and void, and so indefinite as to the description of the business and employment sought to be prohibited as to be unreasonable.

On February 1, 1968, the District Court entered an order (Appendix I) sustaining the Motion to Dismiss and thereafter on February 28, 1968, a further order (Appendix I) adhering to the previous order sustaining Motion to Dismiss.

Respondent appealed from the dismissal of the complaint (R. 56), and upon review the Fifth Circuit Court of Appeals reversed the judgment of dismissal and remanded the case for further proceeding consistent with the views expressed in its opinion (Appendix II).

REASONS FOR GRANTING THE WRIT.

I. By its decision in the instant case the Fifth Circuit Court of Appeals has decided an important State question in a way clearly in conflict with applicable Georgia law contrary to the Rules of Decision Act (Title 28, Section 1652, United States Code), and thus ignored this court's admonition in **Erie Railroad Company v. Tompkins**, 304 U. S. 64, and **Guaranty Trust Company v. York**, 326 U. S. 99.

II. By its decision in the instant case the Fifth Circuit Court of Appeals failed to follow, and in fact completely ignored, the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort, and thus ignored this court's admonition in **Vandenbark v. Owens Illinois Glass Company**, 311 U. S. 538, and **Meredith v. City of Winter Haven**, 320 U. S. 328.

III. By its decision in the instant case the Fifth Circuit Court of Appeals overturned a District Court decision which reached a clearly permissible result in the application of Georgia Law.

I.

Decision in Conflict With Applicable Georgia Law.

The decision of the Fifth Circuit Court of Appeals is in conflict with applicable Georgia law. The language of the covenant

> ". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris"

amounts to a contract in general restraint of trade and therefore contrary to the public policy of Georgia as embodied in **Georgia Code Section** 20-504:

"A contract which is against the policy of the law cannot be enforced; such are . . . contracts in general restraint of trade . . ."

The effect of statutory embodiment of public policy was declared by the Supreme Court of Georgia in **Seay v. Spratling**, 133 Ga. 27, 30, 65 S. E. 137, thus:

"Whenever a subject is clearly covered by provisions of the code, questions of public policy and the policy of the law are to be determined by these provisions."

Historically, Georgia has entertained the view that agreements contrary to public policy are to be considered void.

Hanley v. Savannah Bank and Trust Company, 208 Ga. 585, 68 S. E. 2d 581;

Glosser v. Powers, 209 Ga. 149, 71 S. E. 2d 230;

Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 802, 51 S. E. 2d 669.

General language, of the type and character here presented, has been consistently denied enforcement by the Georgia Courts as indicated by holdings, viz:

Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S. E. 2d 338

"... engage in or become associated with any business competitive to . . ."

Bonner v. Bailey, 152 Ga. 629, 110 S. E. 875

"not to go into business in competition with . . ."

Everett v. Boone, 157 Ga. 372, 121 S. E. 240

"... not operate any business that will conflict in the least with the business sold to and operated by M. E. Everett . . ."

Artistic Ornamental Iron Co. v. Wilkes, 213 Ga. 654, 100 S. E. 2d 731

"... from engaging in a competitive business anywhere in the State of Georgia."

Other holdings to the same effect could be cited. In the face of the foregoing the Fifth Circuit Court of Appeals chose to rest its decision upon **Strauss v. Phillips**, 180 Ga. 641, 180 S. E. 2d 123, in which the language was **specific** rather than general and equated the language of **Strauss v. Phillips** with the language of the contract at bar when the two are not compatible. The difference becomes glaring when the two are set in immediate context:

Case at Bar.	**Strauss.**
". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."	". . . enter or engage, directly or indirectly, in the retail jewelry business or the sale of jewelry, silverware, diamonds, or watches, . . ."

In short, the Fifth Circuit Court of Appeals holds that the specific and definite language "retail jewelry business or the sale of jewelry, silverware, diamonds, or watches" is the legal equivalent (at least so far as the present case is concerned) of the non-specific and indefinite language "be connected with or concerned in any business or employment which shall be in competition with Farris". Such a premise is untenable.

The result reached is "substantially different" from that which would have been reached by the Georgia Courts. Grant of certiorari is therefore required by holdings of this Court in:

Erie Railroad Company v. Tompkins, 304 U. S. 64;
Angel v. Bullington, 330 U. S. 183;
Guaranty Trust Company v. York, 326 U. S. 99;
Woods v. Interstate Realty Co., 337 U. S. 535;

and other similar decisions.

II.

Court Failed to Apply Latest Georgia Decision.

In its decision the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S. E. 2d 910, which is the latest decision of the Supreme Court of Georgia and, as will appear from the decision of the District Judge (Appendix I), was the decision followed by the District Judge.

Comparison of the covenant involved in **Fox** with the covenant at bar clearly demonstrates the error of the Fifth Circuit Court of Appeals.

Fox.	**Case at Bar.**
". . . not to engage in competition with the company or any subsidiary of the company . . ."	". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris".

The critical words in each instance are "in competition with" which fly in the face of the public policy of Georgia as set forth in the statute hereinbefore quoted.

The decision of the District Judge, having been predicated upon **Fox** was right and should have been affirmed. Failure of the Fifth Circuit Court of Appeals to follow the **Fox Case** . . . the latest decision by the Supreme Court of Georgia . . . calls for the grant of certiorari as in

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538

and

Meredith v. City of Winter Haven, 320 U. S. 228

for, as pointed out in **Middle Atlantic Utilities Co. v. S. M. W. Development Corp.**, 2 Cir., 392 F. 2d 380, 384

> "The federal courts must apply the most recent interpretation of state law in diversity cases."

III.

The Decision Overturned a Clearly Permissible Result Under Georgia Law.

The District Judge in dismissing Respondent's complaint reached a clearly permissible result in the application of Georgia Law (Appendix I). Its overturn by the Fifth Circuit Court of Appeals is contrary to decisions of this Honorable Court, other Circuit Courts of Appeal, and other Fifth Circuit decisions.

As to matters of state law this Honorable Court has said, **Brady v. Maryland**, 373 U. S. 83, 90

> ". . . state courts, state agencies, and state legislature are its final expositors under our federal regime."

The dismissal having been persuaded by the most recent decision of the Supreme Court of Georgia, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S. E. 2d 910, was a clearly permissible result which should not have been overturned.

Luther v. Maple, 8 Cir., 250 F. 2d 916, 922;
Sudderth v. National Lead Company, 5 Cir., 272 F. 2d 259, 263;
Citizen's Insurance Company v. Foxbilt, Inc., 8 Cir., 226 F. 2d 641.

CONCLUSION.

It is obvious the Fifth Circuit Court of Appeals found itself in disagreement with the public policy of Georgia and, being in disagreement, declined to follow it. As said in **Angel v. Bullington**, 330 U. S. 183, however

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

The situation here presented can be remedied only by grant of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX I.

United States District Court,
Northern District of Georgia,
Rome Division.

The Day Companies, Inc.,
Plaintiff,

vs.

Claud T. Patat, Jr., John L. Farris and Patat Plywood Corporation,
Defendants.

} Civil Action Number 1945.

Order on Defendants' Motion to Dismiss.

This is a diversity action for injunctive relief and damages for the enforcement of a covenant not to compete, allegedly violated by defendants. The complaint shows that in April of 1966 John L. Farris was the president and majority stockholder of Farris Plywood Co., a company engaged in the manufacture and sale of plywood. Claud T. Patat, Jr. was manager of Farris Plywood Co. On April 20, 1966, Farris Plywood Co. was sold to Columbus Packing Co. This sale of the business was accompanied by a "covenant not to compete" wherein John L. Farris agreed that he would not, "either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris." A later merger gave The Day Companies, Inc., the plaintiff herein, all the rights, title and interest which Columbus Packing Co., Inc. had in the business and in the contract with John L. Farris. The complaint

goes on to allege that in March, 1967, the defendant corporation Patat Plywood Corp. was incorporated with Claud T. Patat, Jr. and John L. Farris as officers and began to operate in the manufacture and sale of plywood. Claud T. Patat, Jr. and Patat Plywood Co. allegedly had knowledge of the terms of the contract and were abetting John L. Farris in the violation of his contract with plaintiff. Plaintiff asks for damages as well as injunctive relief.

Defendants now move to dismiss pursuant to Rule 12(b) on the ground that this covenant not to compete is contrary to the public policy of Georgia and therefore null and void. More specifically, defendants argue that the phrase "in the area presently operated in by Farris" is too indefinite as to the description of the business or the employment prohibited. Moreover, it is contended that the covenant is unreasonable as to the territory in which such conduct is proscribed. Defendants concede that the Georgia courts have treated somewhat differently covenants which are ancillary to the sale of a business, but contend that these decisions have been limited in that variation is allowed only as to the time factor and not as to description of territory and the prohibited activity. Finally, defendants argue that the covenant undertook to prohibit competition with Farris Plywood Co. only and not competition with The Day Company. Accordingly, these defendants could not have been in competition with Farris Plywood Co. as it was neither in existence nor in operation at the time of the filing of this complaint.

Plaintiff argues that defendants' motion to dismiss is in reality not unlike a general demurrer. As to the indefiniteness of the covenant, plaintiff points out that the entire contract has not been incorporated into the complaint and that plaintiff should have an opportunity to present its case by introduction of oral evidence to sup-

port the allegations of the complaint, by showing, inter alia, the specific area in which Farris Plywood Co. was operating at the time the covenant was signed, the area in which Patat Plywood Corp. is now operating, the knowledge by defendants of the area in which Farris Plywood Co. was operating, and the willful violations of the terms of the covenant by defendants. Plaintiff contends that the above showing will constitute the requisite definiteness as to prohibited conduct that has been required by the Georgia courts. Also in support of this position, plaintiff contends that the Georgia courts have given greater latitude in those covenants relating to the sale of a business than in those covenants ancillary to an employment contract. Through this argument plaintiff seeks to distinguish many of the recent cases cited by defendant. Furthermore, plaintiff contends that the covenant is not unreasonable as to territory, for the covenant applied only to the area in which Farris Plywood Co. was then operating.

The standard to be used in ruling upon a motion to dismiss is clear. "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A *Moore's Federal Practice* ¶ 12.08 at 2245 (2d ed. 1967). This standard has been frequently restated and emphasized by the Fifth Circuit. See, *e. g.*, Arthur H. Richland Co. v. Harper, 302 F. 2d 324.

The problem of covenants not to compete in Georgia has caused great difficulty for the courts and practitioners over a long period of time. Georgia has been particularly strict in these matters because of a long-standing public policy prohibiting contracts in "general restraint of trade." See Georgia Code, § 20-504. Likewise, there is an admonition against the use of an injunction to enforce

such contracts of similar long-standing. See Georgia Code, § 20-504. With such background, contracts against competition and in restraint of trade have been frequently held to be void on their face as against Georgia public policy. Three prime requisites have been imposed by the Georgia courts on covenants not to compete: (1) reasonableness as to the time of the restraint; (2) definiteness and reasonableness as to the territory involved; (3) definiteness as to the nature, kind and character of the activities prohibited by the contract. This third requisite as properly understood actually contains two distinct elements: (a) definiteness as to the type business in which competition is prohibited and (b) definiteness as to the type activities within a given business that are prohibited. The proper inquiry in this opinion is whether the covenant in question is as a matter of legal certainty unreasonable or uncertain as to any of these requisites. This Court's personal views on the preferable criteria for an enforceable covenant not to compete are not controlling, but must yield to the law as set forth by the highest courts of Georgia to determine this matter. Also, it should be noted at the outset that the question of the adequacy of the terms of this covenant is a question of law. See *e. g.*, Hood v. Legg, 160 Ga. 620 (1925).

Plaintiff takes the position that the Georgia courts have demonstrated more leniency in construing a covenant ancillary to the sale of a business as opposed to a covenant in an employment contract. From a reading of the relevant Georgia cases, the Court must agree that the position taken by plaintiff on this matter is correct, logical, and appropriate.[1]

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[1] The Court confidently makes this assertion, for the distinction is explicitly mentioned by the Georgia courts and finds support in both logic and various other authorities. However, in the citation of cases, the Georgia courts often interchange the cases concerning employment contracts and the cases relating to the sale of a busi-

Having disposed of the threshold question, it is necessary to examine more closely the particular provisions of this covenant as against the three requisites previously mentioned. The time requisite presents no problem. The covenant is limited to a five year period and under the Georgia cases, this requirement is easily met. See, *e. g.*, Brittain v. Reed, 220 Ga. 794 (1965); Wood v. McKinney, 205 Ga. 370 (1949).

The limitations in the covenant as to territory and the kind of activities prohibited are found in the phrase "in the area presently operated in by Farris." Are these limitations sufficiently definite and reasonable to meet the tests set out by the Georgia courts? Setting aside for the moment any technical questions as to the admissibility of parol evidence in this situation, it seems rather clear that plaintiff can by evidence establish that the covenant was sufficiently definite and reasonable as to the prohibited territory. The Georgia cases seem to allow a restraint which extends only throughout the territory covered by a business and its goodwill. Kutash v. Gluckman, 193 Ga. 805 at 808 (1942). Recent cases such as Fox v. Avis

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ness. For example, in Fox, *infra*, a case relating to the sale o stock, the Court cites 10 cases, nine of which deal with employment contracts. This interchanging of cases, while confusing the pattern, would not seem to affect the logic or the validity of the position taken by the Court in the above text.

Some of the Georgia cases have held that the time requisite in a covenant ancillary to the sale of a business is not subject to the reasonableness test. See, *e.g.*, Holtman v. Knowles, 141 Ga. 613 (1914); Swanson v. Kirby, 98 Ga. 586 (1896). Other cases indicate strongly that flexability as to all requisites is the rule in Georgia. See, *e.g.*, The Insurance Center, Inc. v. Hamilton, 218 Ga. 597 (1963); Orkin Exterminating Co. of South Ga. v. Dewberry, 204 Ga. 794 (1949); Hood v. Legg, 160 Ga. 620 (1925). For support of this differentiation, the Georgia courts have frequently cited the *Corpus Juris Secundum* treatment of this problem. See 17 *C. J. S.* at 1136 for a general statement of the distinction. The rationale for such a distinction is discussed in detail at 17 *C. J. S.*, § 254, fns. 46.5-47.10. For a similar approach, see the well reasoned opinion in Hood v. Legg, 160 Ga. 620 at 628-29 (1925).

Rent-A-Car Systems, Inc., Civil Action No. 24,124 (Ga. Supreme Court, September 7, 1967), support this view as to territorial limits in covenants ancillary to the sale of a business or analogous transactions. As explained before, the cases involving employment contracts are not applicable. See, *e. g.*, Orkin Exterminating Co. of South Ga. v. Dewberry, *supra* (employment contract—practically all of Georgia held to be an unreasonable territory). See The Insurance Center, Inc. v. Hamilton, 218 Ga. 597 at 602-03 (1963) for a representative listing of cases dealing first with the sale of a business, then with covenants in employment contracts. But this ends this inquiry only for purposes of the motion to dismiss. In Turner v. Robinson, 214 Ga. 729 (1959), the Court suggests that the ultimate inquiry in determining the question as to reasonableness of territory limitation must involve a consideration by the Court of "the nature and extent of the trade or business, the situation of the parties, and all the other circumstances . . ." *Id.* at 730. Thus, it is concluded that the question of area may be explained by other evidence. Attention is directed to the more difficult question as to whether this covenant complies with the third requisite, *i. e.*, definiteness as to the kind of activity and the business area prohibited. Both parties attempt to catalogue a number of the cases relating to covenants not to compete, but the value of these efforts is greatly diminished by the presence of such a large number of cases relating to employment contracts. In two early cases, provisions with considerable breadth were upheld. See Monis-Forrester Oil Co. v. Taylor, 158 Ga. 201 (1924) ("the same kind or similar business"); Holtman v. Knowles, 141 Ga. 613 (1914) ("not engage in the same business"). These two cases have been cited rather frequently by the Georgia courts but most of these subsequent cases have used them to support points of law other than the one presently under consideration. Another case which lends some sup-

port to the view taken by plaintiff is Black v. Horowitz, 203 Ga. 294 (1948) ("shall not engage in a like business in any manner whatsoever") cited approvingly in the Insurance Center, Inc. v. Hamilton, 218 Ga. 597 (1963). However, most of the reported cases involve covenants with a much more detailed recitation as to the prohibited activities and the type of business prohibited. A recent Georgia case must be mentioned in completing this discussion. The decision in Fox, *supra*, involved two separate contracts. The court upheld a covenant incident to a stock purchase option agreement wherein the description of the prohibited activity was as follows: ". . . in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of 'the termination of his employment . . .' " However, in the same opinion the court rejected a stock purchase agreement wherein the party agreed "not to engage in competition with the company or any subsidiary . . ." This provision was held to be indefinite and unreasonable in the description of the prohibited business.

It still remains for the Court to examine the particular language of this covenant as against the legal principles heretofore discussed. The third requirement—definiteness as to activities and as to the type business—must be met in the language "be connected with or concerned in any business or employment which shall be in competition with Farris." Initially, it should be noted that the language "connected with or concerned with" on its face tends toward indefiniteness and overbreadth. Moreover, this language tends to militate against the finding of a construction which would provide definiteness as to the third requirement. The Court is less concerned about the definiteness of the "type business" requisite, for the agreement on its face gives some guide as to what subject area was intended, *i. e.*, any business which was in competition with Farris, and therefore could be explained

by other evidence. However, the Court looks more critically at the definiteness and reasonableness of the "prohibited activities" requisite. It could be argued that the agreement does provide for this requisite in the phrase "or employment which shall be in competition with Farris." The Court cannot accept this argument nor can the Court agree that this covenant is sufficiently definite and/or reasonable as to the "prohibited activities" requisite. If the agreement had prohibited merely the selling and manufacturing of timber products or some other definite statement, then some criteria of definiteness as to activities would be present. If the plaintiff argues that the agreement is definite as to activities in that it prohibits all activities which are "connected with or concerned with" the business, then the plaintiff is faced with an unsurpassable problem as to reasonableness in scope.[2] Plaintiff argues that the needed definiteness can be supplied by reference to the knowledge of the parties as to what they understood to be the activities which were prohibited. Absent some criteria on the face of the covenant, such an argument is contrary to well established principle of contract law and certainly the Georgia courts have been unwilling to uphold such a position.[3] Accordingly, the

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[2] It should be noted that the larger the scope of the activities and type businesses prohibited, the greater the likelihood that the courts will find an unreasonable restraint on trade. This is entirely logical and yet so many drafters of these agreements entirely overlook this simple position.

[3] The Georgia courts apparently have not dealt expressly with the application of the parol evidence rule to these covenants. Certainly, the Georgia courts have allowed reference to facts outside the contract in considering the question of reasonableness. See Hood v. Legg, 160 Ga. 620 at 633-34 (1925). The Court does not deem it necessary to decide the exact relevance of this doctrine to covenants of this kind. However, in the Court's view, the plaintiff's position would be strengthened if the covenant on its face attempted to incorporate by reference facts outside the contract. The parties did attempt to incorporate such facts as to the type business prohibited. However, as to the activities prohibited, there is no such attempt.

Court must find that the covenant is on its face indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law.

The Court has taken such pains in explaining this decision because of a great concern for clarity in this uncertain area of the law. Practicing attorneys are understandably wary of this type of agreement. The courts are very restrictive in this area and have provided very few clear guidelines for the practicing attorney.

Beyond the obvious requirements of time and area in Georgia, the agreement must be sufficiently specific and definite to enable a third party (or court) to ascertain the scope of activity prohibited as well as the type of business within which that activity is restricted. Here, there is no certain standard of conduct and the agreement is fatally defective in this regard.

For such reasons, the motion to dismiss is granted.

It Is So Ordered.

This the 1st day of February, 1968.

/s/ Sidney O. Smith, Jr.,
Sidney O. Smith, Jr.,
United States District Judge.

Filed in Clerk's Office
and a True Copy Certified, This
Feb. 6, 1968
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Deputy Clerk

APPENDIX II.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 26,093.

The Day Companies, Inc.,
Appellant,
versus
Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(November 26, 1968)

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Morgan, Circuit Judge: This diversity action sought injunctive relief and damages for the enforcement of a covenant not to compete, allegedly violated by defendants Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation. Appellant is The Day Companies, Inc., successor to Columbus Packing Company, Inc.

The appellees, Patat, et al., filed a motion to dismiss pursuant to Rule 12 (b), Federal Rules of Civil Procedure, on the ground that the covenant not to compete was contrary to the public policy of Georgia and therefore null and void, and that the covenant was so indefinite as to the description of the business and employment prohibited

to be unreasonable. Day afterward amended the complaint. The District Court held that the amendment did not cure the complaint and dismissed the complaint as amended. It is from this order of dismissal that the appeal was brought to this Court.

The action alleges that in April of 1966, John L. Farris was the president and majority stockholder of Farris Plywood Company, a corporation engaged in the manufacture and sale of plywood in Cuthbert, Georgia. Claud T. Patat, Jr., was manager of Farris Plywood Company. On April 20, 1966, Farris Plywood Company was sold to Columbus Packing Company, a Mississippi corporation. This sale of the business was accompanied by a "covenant not to compete" wherein John L. Farris agreed:

> "the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

A later merger gave the Day Companies, Inc., the appellant-plaintiff herein, all the rights, title and interest which Columbus Packing Company, Inc., had in the business and in the contract with John L. Farris. In March, 1967, the defendant corporation, Patat Plywood Corporation, was incorporated with Claud T. Patat, Jr., and John L. Farris as officers, and began to operate in the manufacture and sale of plywood in Polk County, Georgia, some 175 miles north of Cuthbert, Georgia. Claud T. Patat, Jr., and Patat Plywood Corporation allegedly had knowledge of the terms of the contract and were abetting John L. Farris in the violation of his contract with plaintiff The Day Companies.

The ultimate issue which this Court must determine is whether the provision of the contract set out above is void as contrary to the public policy of Georgia, or whether such provision is valid and therefore enforceable. Under *Erie – Klaxon,*[1] the District Court was required to apply the Georgia law, sitting as a Georgia Court.

The three prime requisites to sustain a covenant not to compete in Georgia are: (1) reasonableness as to the time of restraint; (2) definiteness and reasonableness as to the territory involved; and (3) definiteness as to the nature, kind and character of the activities prohibited by the contract.

Although the appellees attempt to void the contract as violating the requisites as to time and territory, we conclude that the District Court was correct in its conclusions that the contract was valid as to these two essentials of a covenant not to compete.

The contract in the case at hand was limited to five years. This restriction was reasonable. The Georgia authorities support the proposition that a contract for the sale of business may contain a covenant not to compete that is unlimited in time. As far back as 1877 the Supreme Court of Georgia dealing with the sale of a business held in the case of *Goodman v. Henderson,* 58 Ga. 567, that "the limit of time made no difference if the contract was limited as to space".

Considering the challenge as to the territory prerequisite, was this covenant reasonable and definite as to the area involved here? The limitation in the covenant as to territory in the case at hand is found in the phrase "in the area presently operated in by Farris". The cases from the Georgia Courts seem to permit restraints which extend throughout the territory covered

[1] *Erie R. Co. v. Tompkins,* 304 U. S. 64; *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U. S. 487.

by a transferred business. As was observed by Judge Jenkins of the Georgia Supreme Court in *Kutash v. Gluckman,* 193 Ga. 805, "a contract which affords a fair protection to the party in whose favor it is made, and is not injurious to the public . . . may extend to all the territory covered by the business the good will of which has been sold . . ." We agree with the Court below that the standard of area is met in the agreement in question.

We now reach the third requirement dealing with the definiteness as to the activities and as to the type business. On this requisite the Court below ruled that the covenant was "indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law." We disagree and reverse.

The part of the covenant ruled void reads:

> "he shall not, either directly or indirectly, alone or in concert with any other person, firm or corporation, *be connected with or concerned in any business or employment which shall be in competition with Farris"* (emphasis supplied).

Most of the Georgia cases encountered in this restrictive covenant field deal with the first two prerequisites, to-wit: time and space. In attempting to ascertain the applicable Georgia rules, there is no difficulty in finding the appropriate general statements on all three requisites. As was so aptly stated by Judge Hoover of the Ohio Court of Common Pleas,[2] "This is not one of those questions on which the legal researchers cannot find enough to quench his thirst. To the contrary, there is so much authority, it drowns him." In sum, the Georgia rule, and most other jurisdictions, is that a restraint on trade in the form of a covenant will be countenanced when, under all the circumstances, it is reasonable. This question, though

[2] *Arthur Murray Dance Studios of Cleveland v. Witter,* 105 N. E. 2d 685, 687.

largely factually orientated, is one for the Court. *Rakestraw v. Lanier,* 1898, 104 Ga. 188, and Chief Judge Brown's opinion in *Budget Rent-A-Car Corporation of America v. Fein* (5 Cir., 1965), 342 F. 2d 509, 514.

The dominant considerations of reasonableness have been expressed for Georgia in several cases. In considering whether the limitations are reasonable, the Court must consider the nature and extent of the trade and the business, the situation of the parties, and all the other circumstances. *Rakestraw v. Lanier,* supra.

To withstand attack, the covenant must be reasonably necessary to protect the interest of the party in whose favor it is imposed, and must not unduly prejudice the interest of the public. The restrictions imposed upon the seller must not be larger than are necessary for the protection of the buyer.

Georgia, along with many other jurisdictions, has allowed greater latitude in determining the reasonableness of a restrictive covenant when the covenant relates to the sale of a business than in those covenants ancillary to an employment contract. See *Orkin Exterminating Co. of South Georgia v. Dewberry,* 204 Ga. 794.

A covenant not to compete as an adjunct to the sale of a business enables the seller to capitalize on the disposition of his good will and receive a higher price. In many instances, such as in the case at hand, the covenant may have been the dominant inducement to the Mississippi purchaser, realizing that the plant it was purchasing was a going concern with hope of retaining the present customers. Likewise, the likely effect of the sale of the going business from the seller to the buyer would leave the area with one concern or at least with one less concern.

The Georgia courts dealing with the sale of businesses permit more indulgence as to the scope of activities prohibited by the restrictive covenants. The District Court

found that the covenant in the contract at hand indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law. With this holding we cannot agree. The Georgia courts, according to this Court's interpretation of *Strauss v. Phillips,* 180 Ga. 641, and *Morris-Forrester Oil Co. v. Taylor,* 158 Ga. 201, would have found this "sale of business" more acceptable.

In *Strauss v. Phillips,* supra, Phillips was engaged in the retail jewelry business in Atlanta, being connected with and owning stock in the business. Strauss purchased all the stock and interest in the business from Phillips, and a contract was entered into between the buyer and the seller. As a consideration of the purchase, Phillips contracted that for a term of five years he would not ". . . enter or engage, directly or indirectly, in the retail jewelry business or the sale of jewelry, silverware, diamonds, or watches, either as agent or merchant . . ."

Phillips sought to work as a bookkeeper and salesman, and when Strauss sought injunctive relief, Phillips contended the covenant was contrary to public policy and prevented him from doing any work or labor or earning a sustenance. The Supreme Court of Georgia in a full bench decision in *Strauss* held at page 644:

> "The question before the court is whether or not the defendant has violated his contract with petitioner by engaging 'directly or indirectly' in the retail jewelry business in the time and within the territorial limits fixed by his contract. In *Morris-Forrester Oil Co. v. Taylor,* 158 Ga. 201 (122 S. E. 680), involving the sale of a certain oil and gasoline business it was held that the defendant 'had covenanted not to become a constituent part, sharer in, partaker of, or engage in or reap the benefits from the sale of gasoline and oil within 20 miles of Atlanta, and the fact that he was engaged as an employee of the Continental Oil Company would be no less a violation of the covenant

than if he conducted the business in his own name.' It was held further in that case that a contract not to enter into a certain 'business or the same kind or similar business is unambiguous and excludes on the part of one who makes such a covenant *any participation or sharing or taking a part in the aid of such sales.*' (Italics ours.) See also *Taylor v. Morris-Forrester Oil Co.*, 166 Ga. 43 (142 S. E. 153). It is argued that the construction placed upon the contract in the instant case is contrary to public policy. This question was ably discussed by Gilbert, J., in *Hood v. Legg*, 160 Ga. 620 (128 S. E. 891), where he quoted from 6 R. C. L. 793, § 197, as follows: 'Public Policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation which, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract.' In this connection we call attention to the case of *Legg v. Hood*, 154 Ga. 28 (113 S. E. 642), where it was held that 'where a proprietor sells out a given business, and as a part of the contract covenants not to engage in a similar business in a particular locality, if such covenant is reasonable and otherwise proper it will not be set aside as void on the ground that it is in

> restraint of trade and contrary to public policy.' In the case at bar the defendant admits in his answer that he acted at times as 'bookkeeper and salesman' in his present employment; and we hold that his participation, directly or indirectly, as clerk, bookkeeper, salesman, or in any other capacity, in the same or similar business as that involved in the contract between petitioner and defendant, was a violation of the express covenants therein contained."

This Court is of the opinion that the case at hand is controlled by the teachings of *Strauss v. Phillips*, supra, and the cases cited therein, and that the covenant not to compete executed in the contract of sale between the parties in April, 1966, is valid and enforceable.

For the reasons given, the judgment of the District Court as to the validity of the contract is reversed and the cause is remanded for further proceeding consistent with the views expressed herein.

Reversed and Remanded.

APPENDIX III.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1968.

No. 26,093.

D. C. Docket No. CA 1945.

The Day Companies, Inc.,
Appellant,

versus

Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Claud T. Patat, Jr., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 26, 1968

Issued as Mandate:

APPENDIX IV.

[247a]-Morgan

In the United States Court of Appeals
For the Fifth Circuit.

No. 26,093.

The Day Companies, Inc.,
Appellant,

v.

Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(December 23, 1968)

On Petition for Rehearing.

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby Denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 962.

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Appellants-Petitioners,

versus

THE DAY COMPANIES, INC.,
Appellee-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 962.

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Appellants-Petitioners,

versus

THE DAY COMPANIES, INC.,
Appellee-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

Respondent, The Day Companies, Inc., adopts as substantially correct the statement of the case set forth in the petition. It is pointed out, however, that the amended complaint alleged: "The manufacturing operation of Farris Plywood Corporation was highly specialized consisting of the manufacture of plywood door skins for use in the construction of flush doors. Eighty-five percent of its

production of door skins was birch and the remainder was a mixture of walnut, oak, mahogany, pecan, cherry, ash and gum in varying colors and grades." It also alleged that Columbus Packing Company, Inc. would not have agreed to purchase the stock of Farris Plywood had not John L. Farris, principal stockholder, agreed individually to enter into the covenant not to compete with Farris in the area at that time operated in by Farris until December 31, 1971. It also alleged that John L. Farris and Claud T. Patat, Jr., knew the nature of the manufacturing operation engaged in by Farris Plywood Corporation and the geographical area in which said corporation operated.

REASONS FOR DENYING THE WRIT.

This case involves application by the Fifth Circuit Court of Appeals of the statutory and judicial law of Georgia to a private contract. The decision rendered by the Fifth Circuit is applicable only to the facts in this particular litigation and does not involve a case wherein the Court of Appeals "has decided an important State or Territorial question in a way in conflict with applicable State or Territorial law".

I.

Decision Is Not in Conflict With Applicable Georgia Law.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals is in conflict with applicable Georgia law. In support they quote Georgia Code, § 20-504, to the effect that certain contracts in **general restraint** of trade are against the policy of the law and cannot be enforced. This Code Section has been interpreted by the Appellate Courts of Georgia time and again. The Georgia courts have consistently held that contracts in **reasonable restraint** of trade are valid and enforceable.

Georgia, as most states, makes a distinction between covenants relating to the sale of a business and those that are ancillary to an employment contract. The most recent restatement of this doctrine being in **Taylor Freezer Sales Co. v. Sweeden Freezer Eastern Corp.** (1968), 224 Ga. 160, 160 S. E. 2d 356, where the Court held:

> "Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract. 17 CJS 636, par. 354; Rakestraw v. Lanier, supra [104 Ga. 188, 30 S. E. 735]; Hood v. Legg, 160 Ga. 620 (128 S. E. 891); J. C. Pirkle Machinery Co. v. Walters, 205 Ga. 167 (52 S. E. 2d 853)."

The validity of contracts not in general restraint of trade was reaffirmed by the decision in **Seay v. Spratling** (1909), 133 Ga. 27, 65 S. E. 137, cited by petitioner, in which the Court at page 29, held:

> "Our Civil Code, § 3668 [now 20-504] declares that 'contracts in general in restraint of trade' can not be enforced. In the case of Goodman v. Henderson, 58 Ga. 567, it is said that 'The principle seems to be, that the restraint of trade must be limited in territory, limitation in time not affecting the validity of the contract. . . . So that the court rules, in 10 Ga. [Holmes v. Martin, p. 503], that the only requisition was, that the contract should be founded upon a good and valuable consideration and confined in space. It is true that Judge Lumpkin does use the words, "or for a limited time," but in the very case he was deciding the time was unlimited, and we have shown that the limit as to time makes no difference if the contract be limited as to space.' The opinion from which this excerpt was taken was a deliverance of this court in a case where the restraint of trade as contained in the contract was

not general, and the contract was upheld as valid; but the doctrine announced is distinctly recognized in numerous decisions of this court. In the case of Holmes v. Martin, supra, Judge Lumpkin, speaking for the court, said: 'But the distinction was early taken, and is established by an unbroken current of authority, English and American, between such stipulations as are in general restraint of trade, and such as are in restraint of it only as to particular places and persons, or for a limited time. The latter, if founded upon a good and valuable consideration, are valid, while the former are universally prohibited.' "

Hanley v. Savannah Bank and Trust Company (1951), 208 Ga. 585, 68 S. E. 2d 581, had to do with an entirely different situation. The court there dealt with an effort to enforce specific performance of a contract in which a part of the consideration of the alleged contract to make a will was an agreement by the mother to surrender possession of her infant child in order to receive a benefit for herself and her other children. The Court held such a contract was void as being against public policy. Likewise, **Glosser v. Powers** (1952), 209 Ga. 149, 71 S. E. 2d 230, also cited by petitioner dealt with a scheme to defraud the United States Government by improper use of the defendant's eligibility to secure a low interest long term loan pursuant to the Servicemen's Readjustment Act of 1944. **Orkin Exterminating Co. v. Dewberry**, 204 Ga. 794, 51 S. E. 2d 669, concerned a covenant not to compete ancillary to a contract of employment made by a veteran who applied for on-the-job training under the Servicemen's Readjustment Act. The Court in that case held the contract of employment would have prohibited him from continuing his employment in the trade for which he had been trained almost anywhere in the State of Georgia, including many areas in which Orkin Ex-

terminating Company had never engaged in business. The Court found the territorial scope of the contract was unreasonable and unnecessary for the protection of the party in whose favor the restraint was imposed as well as oppressive to the party restrained and opposed to the interest of the public and accordingly contrary to public policy and void.

Each of the Georgia cases cited by petitioner as supporting their allegation that "general language of the type and character here presented has been consistently denied enforcement by the Georgia Courts" was cited in petitioners' briefs in the Circuit Court of Appeals. The Circuit Court considered these cases and obviously found that they were not applicable to the factual situation presented.

Dixie Bearings, Inc. v. Walker (1963), 219 Ga. 353, 133 S. E. 2d 338; and **Artistic Ornamental Iron Co. v. Wilkes** (1957), 213 Ga. 654, 100 S. E. 2d 731, each involved covenants ancillary to contracts of employment. **Bonner v. Bailey** (1921), 152 Ga. 629, 110 S. E. 875, was based upon a lack of territorial limitation in the contract. **Everett v. Boone** (1923), 157 Ga. 372, 121 S. E. 240, also cited by petitioner was likewise decided upon the ground there was no limitation as to space or territory in the contract. The first headnote of that decision being:

> "A contract without limitation as to space or territory, although limited as to time, not to engage in a particular trade or business, is unenforceable as being against the policy of the law. Consequently, where one agreed, upon a valuable consideration, to sell his entire stock of goods, etc., and not to engage in business 'in competition with' the purchasers for a period of three years, such a contract is without limitation as to space or territory, and is unenforceable as being in violation of the rules laid down above."

It will be noted the Georgia Court apparently was not concerned by the language "in competition with".

None of the cases cited in the petition for a writ of certiorari are in any way in conflict with the decision of the Fifth Circuit Court of Appeals in the instant case, and on the contrary are in complete harmony with it.

The decisions of the United States Supreme Court cited on page 8 of the petition as supporting the conclusion that certiorari is required deal with completely different factual situations. Each of the four cases there cited involved instances in which the Supreme Court granted certiorari because the Courts of Appeal had failed to apply applicable State laws. Not a single one of the cases cited dealt with an instance where the Supreme Court disagreed with the interpretation of a Court of Appeals as to the applicable State law, after it had been construed and applied by the Court of Appeals.

In the instant case, the Fifth Circuit Court of Appeals did apply Georgia law and rested its decisions squarely upon Georgia law. There was no failure on its part to apply State law. Petitioner complains because the Court of Appeals did not interpret the applicable Georgia statutes and decisions in the same manner that petitioners and the District Court interpreted them.

II.

Court Did Not Fail to Apply Latest Georgia Decision.

The petitioner argues that the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S. E. 2d 910, which it alleges to be the latest decision of the Supreme Court of Georgia. This case was cited by petitioners in their brief in the Court of Appeals and in their petition for rehearing. Obviously it was carefully considered by the Court of Appeals.

The decision of the Court of Appeals is in accord with the decision of the Supreme Court of Georgia in the Fox case. In that particular case Avis filed suit against Fox alleging in two counts violations of two separate contracts between Avis and Fox. The Court upheld an agreement in Count One that Fox would "not engage in competition with ITT or any subsidiary of ITT in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of" the termination of his employment with the plaintiff for a period of two years after the termination date "in any city in the United States where employee was employed or stationed by ITT or any subsidiary of ITT." The second count which the Supreme Court held to be fatally defective contained language in which Fox agreed "not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date in any city of the United States wherein he was, in the five year period preceding such termination date, employed or stationed by the company or any subsidiary of the company." The Court held the contract was fatally defective and void because it is indefinite and for that reason unreasonable in the description of the prohibitive business. It will be noted that this involved a contract not to engage in competition with International Telephone and Telegraph Corporation or any subsidiary of the company. The contract dealt with in the second count did not restrict it to any business of ITT or any subsidiary in which the employee Fox had been engaged, but related to competition with the company or any subsidiary of the company. It was obviously this language which the Court found to be too broad.

The Fox case is easily distinguishable from the instant case. Here we are dealing with a situation where John L. Farris was the president and principal stockholder of Farris Plywood Company. This was the only business in

which he agreed not to compete. Columbus Packing Company, Inc. paid the sum of $465,000.00 to purchase the capital stock of Farris Plywood Company and alleged that it would not have purchased the stock had not the president and principal stockholder as a condition of the sale agreed not to compete with Farris Plywood Company in the area in the business operated in by Farris for a period of five years.

The Fox case dealt with an employment contract and not with the sale of a business. A later case, **Taylor Freezer Sales Company, Inc. v. Sweeden Freezer Eastern Corporation** (1968), 225 Ga. 160, 160 S. E. 2d 356, decided March 7, 1968, also dealt with an employment contract. The Supreme Court of Georgia there reiterated the rule referred to above that whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court and held as previously pointed out:

> "Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract."

Petitioners apparently are arguing that the Fifth Circuit Court of Appeals could not rest its decision upon **Strauss v. Phillips** (1935), 180 Ga. 641, 180 S. E. 2d 123, because they contend **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S. E. 2d 910, is a later decision and that the Court would be bound to follow Fox. While we do not concede that there is any conflict between the Strauss and Fox decisions, nor do we concede that the Fifth Circuit Court of Appeals failed to follow the rule of law in both cases, if there were a conflict between the two decisions of the Supreme Court of Georgia the Fifth Circuit Court of Appeals would be bound to follow the older decision in accordance with the decisions of the Supreme Court of

Georgia. The Georgia court in **Corley v. City of Atlanta** (1935), 181 Ga. 381, 182 S. E. 177, held:

> "The present case cannot, in the nature of the facts, be distinguished from any of the cases just cited. The decision in each of such cases was concurred in by all of the Justices, and there is no earlier decision which, if properly considered, may be taken as authority to the contrary. These decisions are, therefore, controlling; and they are none the less so even if some later decisions to the contrary may have been rendered, and even though such later decisions may have had the concurrence of all of the Justices. Code of 1933, § 6-1611; Calhoun v. Cawley, 104 Ga. 335, 30 S. E. 773."

See also to the same effect **Jewell Tea Co., Inc. v. Cartersville** (1938), 185 Ga. 799, 196 S. E. 712, holding that earlier unanimous decisions must be followed.

It may be pointed out here that the decision of the Supreme Court of Georgia in **Strauss v. Phillips**, supra, was concurred in by all of the Justices.

The decision did not overturn a clearly permissible result under Georgia law. The Fifth Circuit Court of Appeals found that the District Judge had erroneously applied the applicable Georgia law to the factual situation existing in this case and properly reversed and remanded the case for trial. The correction of errors is the function of the Circuit Court of Appeals. The reasons for the Circuit Court's decision were fully set out in its decision and there is no reason to reiterate these reasons or the citations of authority here.

CONCLUSION AND MOTION FOR DAMAGES.

The Fifth Circuit Court of Appeals recognized the distinction made in Georgia law between covenants ancillary to the sale or dissolution of a business and those ancillary

to contracts of employment. Georgia courts in line with the overwhelming weight of authority in this country hold that greater latitude is allowed in those covenants relating to the sale of a business than in those ancillary to an employment contract. This is for the very obvious and good reason that an individual dealing with an employer regarding terms of employment is at a disadvantage and might be forced to agree to onerous and unfair terms in order to obtain employment. To restrict an individual from practicing his trade or profession without very definite limitations would unduly burden the employee and constitute a general restraint in violation of public policy. On the other hand, the reasons for giving greater latitude in the enforcement of such contracts in connection with the sale of a business is very ably set out in the decision of Circuit Judge John R. Brown in **Budget Rent-A-Car Corporation of America v. Fein** (1965), 342 F. 2d 509, involving a decision by District Judge Lewis R. Morgan (now Circuit Judge and author of the decision below) interpreting Georgia law relative to restrictive covenants. Therein Judge Brown said:

> "In a sale of business situation, a reasonably drawn covenant will be enforced because it allows the seller to dispose of his good will and the purchaser to buy it. The necessity for a covenant is not so much that the seller has intimate knowledge of a particular line of business, but rather he, as a dominant personality, is so much the life of the business and is known to customers as such, that the buyer would run the very real risk of loosing what he had paid for should the seller shortly become his competitor. By protecting this transaction, the covenant facilitates the free transfer of property which is in the public interest."

The imaginary situation that concerned Judge Brown exists in fact in this particular case. Columbus Packing Company, Inc. agreed to buy the stock of Farris Plywood

Company for the sum of $465,000.00 provided the president and principal stockholder, John L. Farris, agreed not to compete with Farris Plywood Company for a period of five years. The complaint shows that less than 90 days after Mr. Farris terminated his connection with Farris Plywood Company he began business in Polk County, Georgia in concert with Claud T. Patat, Jr., former manager of Farris Plywood Company, and was engaging in the manufacture and production of plywood door skins which were selling in the same area in which Farris Plywood was operating the date the contract was executed. The complaint alleges that at the time it was filed the plaintiff had already been damaged in the sum of $100,000.00.

This case involves an instance in which an able business man dealt at arms length in the sale of the stock he and members of his family owned in a corporation which he had developed. He agreed not to compete with the corporation which he was selling. He and his family accepted the sum of $465,000.00 and in less than 90 days had violated his written agreement.

The United States Court of Appeals for the Fifth Circuit after reviewing all of the record, briefs for all parties, considering argument of counsel, reversed the decision of the District Court and remanded the case for trial upon its facts. The Court then considered the petition for rehearing which was denied.

Petitioners have shown no reason why the Supreme Court of the United States should grant certiorari to review the decision of the Circuit Court interpreting the provisions of a private contract.

The petition for a writ of certiorari should be denied. Respondent moves the Court for an award of damages pursuant to Rule 56 (4) of the Rules of this Court, if the

petition for writ of certiorari be denied, upon the ground that it is manifest that there was no ground for granting such a writ.

Respectfully submitted,

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